Supreme Court, U.S.
FILED

001469 MAR 15 2001

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No.

IN THE

Supreme Court of the United States

ESTHER BEIN AND WILLIAM BEIN
Petitioners

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ESTHER BEIN and
WILLIAM BEIN
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Questions Presented For Review

1. What is the extent of the sovereign immunity of the United States as it pertains to the property rights of the individual protected by the 'due process' clause of the Constitution and specifically the extent of the civil equitable powers of a Federal District Court to compensate an individual for destroyed property in direct contravention of court order and Federal Rule of Criminal Procedure 41(e).

2. That in the event that sovereign immunity may not be waived, and that a Federal District Court may not compensate an individual for destroyed property in contravention of court order and Federal Rule of Criminal Procedure 41(e), that monies ordered forfeit from that individual be offset by any damage to that individual as an equitable remedy.

On July 7th, 1999, the United States District Court for the Western District of Pennsylvania ruled on petitioners Motion for Return of Seized Property in Criminal No. 94-214. A Motion to Amend and/or Alter Judgment pursuant to F. R. C. P. 59(e) was denied on August 18, 1999. Appeal was taken and *United States v. Esther Bein and William Bein*(2000), 214 F. 3d 408 affirmed the August 18, 1999 decision of the District Court. On July 19, 2000, petitioners herein petitioned for rehearing or/and suggestion for *en banc* rehearing. The court issued a certified copy in lieu of a mandate on December 13, 2000. All of these orders are included in the Appendix herein and it is from the certified judgment of December 13, 2000 that this petition is filed.

US Code: Title 28, Section 1254 confers jurisdiction to the Supreme Court to review the appellate decision, and a copy of Fed R. Crim. P. 41(e) is included in the Appendix herein.

The petitioners declare under penalty of perjury that the herein writ of certiorari has been served on the Solicitor General of the United States pursuant to Rule.

This matter concerns the appeal by petitioners from an order of the district court entered August 18, 1999, denying their motion to amend or alter an order entered July 9, 1999, denying in part their motion pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure for return of property. The petitioners, after the Government wrongfully had destroyed and failed to return their property, filed their Rule 41 (e) motion for the return of the property or compensatory damages. The district court granted the motion in part, awarding money damages, and ordered the Government to return the property it still had in its possession. The court, however, denied the petitioners' motion with respect to their claim for losses of additional property. The petitioners appealed, seeking additional damages.

The Government did not appeal, but asserted that the court did not have jurisdiction to entertain the petitioners' motion for compensatory damages because of sovereign immunity. The appellate court agreed and remanded the case to the district court to further deny the petitioners the monies previously ordered. In its opinion, the appellate court made reference to the fact that the third district had previously never made a definitive ruling on the point and analyzed the issue. The court itself made reference to the fact that the district court had reason to believe that it could award damages under Rule 41(e) and cited *United States v. Martinson*, 809 F. 2d 1364 (9th Cir. 1987); *United States v. Kanasco, Ltd.* 123 F.3d 209 (4th Cir. 1997); and *Mora v. United States,* 955 F. 2d 156 (2d Cir. 1992), that suggested such an approach. It further lists the circuits that do not waive sovereign immunity.

There is no question that the courts are very divided on this important issue. The appellate court relied on the reasoning of *Pena v. United States,* 157 F. 3d 984 (5th Cir. 1998) which relies on *Lane v. Pena,* 518 U.S. 187 (1996) and *United States v. Nordic Village, Inc.,* 503 U. S. 30 (1992), and on the independent reasoning of *Department of the Army v. Blue Fox, Inc.,* 525 U. S. 255 (1999). Petitioners respond that the Supreme Court decisions are very specific. *Nordic* states in its very last sentence that "(S)ince Congress has not empowered a bankruptcy court to order a recovery of money from the United States, the judgment of the Court of Appeals must be reversed. Congress has given express rights to district courts to render payment. See generally US Code Title 28, Section 2414 (Appendix).

Lane may also be differentiated because it relies on an Act which has multiple provisions that separated relief. It relied on a reasoning that "(T)his is not a case which a right of action exists to enforce a federal right and Congress is silent on

the question of remedies." In the instant matter, Congress is silent on the question of remedies. *Blue Fox* deals with substituted relief of a lien. The fact is that money is the end all-be all of such an action. Petitioners state that at all times they would rather have the property back. Indeed, petitioners have always stated that the property still exists. The cart was 'found' even though the Government stated that it had been destroyed. The only testimony edifying destruction was made by a witness who was a stipulated perjurer and the only documentation edifying destruction is a document stipulated to be false. Indeed, the prosecutor suborned the testimony of the perjured witness because nobody knew where the property was. Factually, the court did determine that the property was allegedly destroyed just three weeks after the court ordered the return of the items. *Martinson's* fears have come to light and the Government seeks to add the insult of, we don't have to return things that are court ordered, or statute indicated, rather we may just say the items are gone and go on scot free.

This is definitely a constitutional issue of paramount importance. The fact that the courts seem to be evenly divided demonstrates the ambiguity of a common understanding of the law.

Though, petitioners believe that sovereign immunity may be waived in this matter, in the event that this Honorable Court dictates that such does apply, petitioners would state that equity would still demand a return of some of the monies ordered forfeit by the District Court. It is respectfully submitted that the appellate court failed to consider the fact that monies were paid as and for a fine and / or forfeiture to the district court by the petitioners. The district court ordered the payment of $150,000.00 at the same time that it ordered the Government to return petitioners' property. The forfeiture/fine was to be paid within six months of the verdict. If the property

would have existed at the time the payment became due, and if the payment were not forthcoming, there is no question that the Government would be entitled to attach the said property. Any funds reached by said attachment would inevitably reduce the sum that would have been owed by the petitioners. The converse must equitably exist.

The Government by destroying the property, in direct contravention of a legal court order, and mandated rule, has defacto attached said property for its own use. There is no evidence whatsoever as to how the property was destroyed or even if it was destroyed, except for the stipulated perjured testimony of a police detective, and the stipulated false log that he had fabricated.

There thus has been created a 'fund' by which the Government may return monies to the petitioners. Even if it is decided that sovereign immunity does exist, in the instant matter, monies exist to equitably recompense petitioners for their loss. It would not be an award of monetary damages, rather the return of an overpayment. This would necessitate a determination of loss suffered by petitioners and would put an upper bound on any return. This is especially equitable, since the property was allegedly destroyed in April of 1996, and the monies were paid by Appellants in November of 1996. The Government had a duty to inform the district court that it had destroyed the property before the forfeited money was to be paid. This is especially true considering the stipulation that the Government was informed that something 'fishy' had occurred in August - September of 1996. Since the appellate court did not adjudge the merits as were required, this avenue too was denied petitioners. In the event it is decided that the burden was upon the Government to disprove the petitioners' claims, and there is sovereign immunity, then in that event the appellate court still had to determine a loss sustained by

petitioners.

Petitioners express a belief that the appellate decision is contrary to the decision of other Circuits as stated in the court's own decision, and that consideration by this Honorable Court is necessary to secure and maintain uniformity of decisions, and that this petition involves questions of exceptional importance, to-wit, the extent of the sovereign immunity of the United States as it pertains to the property rights of the individual protected by the 'due process' clause of the Constitution.

Respectfully submitted,
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